Supreme Court, U.S.
FILED
NOV 18 1992
OFFICE OF THE CLERK

No. 92-271

In the Supreme Court of the United States

OCTOBER TERM, 1992

CEDRIC ADAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

THOMAS M. GANNON
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the district court erred in declining to instruct the jury on entrapment.

2. Whether the district court erred in giving a modified *Allen* charge to the jury.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	6
Conclusion	13

TABLE OF AUTHORITIES

Cases:

Allen v. *United States*, 164 U.S. 492 (1896)	4, 6, 10, 11, 12, 13
Andrews v. *United States*, 309 F.2d 127 (5th Cir. 1962), cert. denied, 372 U.S. 946 (1963)	13
Brasfield v. *United States*, 272 U.S. 448 (1926)	11
Hyde & Schneider v. *United States*, 225 U.S. 347 (1912)	12
Jacobson v. *United States*, 112 S. Ct. 1535 (1992)	8, 9
Jenkins v. *United States*, 380 U.S. 445 (1965)	11
Kawakita v. *United States*, 343 U.S. 717 (1952), aff'g 190 F.2d 506 (9th Cir. 1951)	10
Lias v. *United States*, 284 U.S. 584, aff'g 51 F.2d 215 (4th Cir. 1931)	10-11
Lowenfield v. *Phelps*, 484 U.S. 231 (1988)	10, 11
Mathews v. *United States*, 485 U.S. 58 (1988)	7
Sorrells v. *United States*, 287 U.S. 435 (1932)	8, 9
United States v. *Ajiboye*, 961 F.2d 892 (9th Cir. 1992)	12
United States v. *Bailey*, 480 F.2d 518 (5th Cir. 1973)	13
United States v. *Burkley*, 591 F.2d 903 (D.C. Cir. 1978), cert. denied, 440 U.S. 966 (1979)	9
United States ex rel. Anthony v. *Sielaff*, 552 F.2d 588 (7th Cir. 1977)	12
United States v. *Foster*, 711 F.2d 871 (9th Cir. 1983), cert. denied, 465 U.S. 1103 (1984)	13
United States v. *Humphrey*, 670 F.2d 153 (11th Cir.), cert. denied, 456 U.S. 1010 (1982)	7-8
United States v. *Kelly*, 748 F.2d 691 (D.C. Cir. 1984)	7, 8, 10

Cases—Continued: Page

United States v. *Molinaro*, 877 F.2d 1341 (7th Cir. 1989). 7
United States v. *Nichols*, 820 F.2d 508 (1st Cir. 1987) 12
United States v. *Reynoso-Ulloa*, 548 F.2d 1329 (9th Cir. 1977), cert. denied, 436 U.S. 926 (1978)..... 9-10
United States v. *Seawell*, 550 F.2d 1159 (9th Cir. 1977) ... 11
United States v. *Smith*, 635 F.2d 716 (8th Cir. 1980) 12-13
United States v. *Wright*, 921 F.2d 42 (3d Cir. 1990), cert. denied, 111 S. Ct. 2803 (1991) 7

Statute:

21 U.S.C. 846 2

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-271

CEDRIC ADAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals, Pet. App. A2-A3, is unreported, but the judgment is noted at 958 F.2d 1083 (Table).

JURISDICTION

The judgment of the court of appeals was entered on March 12, 1992. The petition for a writ of certiorari was filed on June 11, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner

was convicted of attempting to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846. Pet. App. A5.* The district court sentenced him to 168 months' imprisonment, *id.* at A7, to be followed by a five-year period of supervised release. Pet. 3. The court of appeals affirmed. Pet. App. A2-A3.

1. In August 1989, Dee Woods, a former drug dealer, went to the West Palm Beach, Florida, office of the DEA and agreed to assist the agency in apprehending drug traffickers in exchange for 25 percent of the cash and assets seized as a result of her assistance. Gov't C.A. Br. 3, 7. While she was assisting the DEA in an investigation unrelated to petitioner, petitioner contacted her and inquired about the availability of cocaine for sale. *Id.* at 3. Before Woods began working with the DEA, she and petitioner had offered drugs to each other, but petitioner had refused marijuana offered by Woods, and Woods had refused cocaine offered by petitioner. *Ibid.*

After petitioner's call, Woods arranged for petitioner to meet two undercover DEA agents posing as cocaine suppliers. Gov't C.A. Br. 4. The meeting took place at a restaurant in Palm Beach County, Florida. *Ibid.* Petitioner said that he was interested in a regular business arrangement under which he would purchase eight to ten kilograms of cocaine twice each month. *Ibid.* He described himself as a middleman representing buyers from Chicago and Detroit. *Id.* at 4-5. He requested a total of 11 kilograms of cocaine, eight for the Detroit buyers and

* The jury acquitted petitioner of conspiracy to distribute cocaine, in violation of 21 U.S.C. 846.

three for the Chicago buyers. *Id.* at 5. He agreed to a price of $16,000 per kilogram for a minimum order of five kilograms. *Ibid.* At the end of the meeting, petitioner said he would contact Woods when the out-of-town buyers arrived. *Ibid.*

On January 21, 1990, petitioner contacted one of the undercover agents through Woods. Gov't C.A. Br. 5. Petitioner said that his Detroit contacts were in town and that he was ready to complete a five and one-half kilogram cocaine deal. *Ibid.* He also said he had seen and counted the money for the cocaine. *Ibid.* The agent suggested that the exchange take place at the restaurant where they had previously met. *Ibid.*

Petitioner arrived at the restaurant with Gregory Mays and Mark Sanders. Gov't C.A. Br. 5. Petitioner identified Mays and Sanders as the out-of-town buyers and allowed Woods to look at the money. *Id.* at 5-6. Woods then got into the car and shook hands with Mays and Sanders, who confirmed that they were the buyers and that they had the money for the transaction. *Id.* at 6. When petitioner said he wanted to accompany one of the agents to transport the cocaine to his apartment, the other agent gave a pre-arranged arrest signal, and petitioner, Sanders, and Mays were arrested. *Ibid.*

Incident to the arrest, the agents seized a plastic bag containing $88,773. Gov't C.A. Br. 6. A search of the car in which petitioner had arrived at the restaurant revealed a secret compartment in the car's trunk. *Ibid.* Vacuum sweepings from the compartment were analyzed and found to contain cocaine residue. *Ibid.*

2. At trial, at the close of evidence, petitioner requested that the district court charge the jury on the affirmative defense of entrapment. Pet. 8. The district court denied the request. Pet. 9.

3. After the jury had deliberated for approximately six and one-half hours, it sent a note to the trial judge asking the judge to reread the instructions and stating that it was unable to reach a decision at that time. Pet. 9; Gov't C.A. Br. 16. The judge read the jury instructions a second time, after which the jury resumed its deliberations. Pet. 9; Gov't C.A. Br. 16. Approximately one hour later, the jury sent a note to the trial judge again stating that it was unable to reach a unanimous decision. Pet. 9; Gov't C.A. Br. 16.

The district court then declared a recess until the following morning and informed the parties that the court would give the jury a modified *Allen* charge, see *Allen* v. *United States*, 164 U.S. 492 (1896), in the morning. Pet. 9; Gov't C.A. Br. 16. Over petitioner's objection, the district court gave the modified *Allen* charge set forth in the Eleventh Circuit's Pattern Jury Instructions (Criminal Cases). The instruction advised the jury as follows:

> Members of the jury, I'm going to ask that you continue your deliberation in an effort to reach agreement upon a verdict and dispose of this case; and I do have a few additional comments I would like for you to consider as you do so.
>
> As you know, this is an important case. The trial has been expensive in time, effort, money,

and emotional strain to both the defendant and the prosecution.

If you should fail to agree upon a verdict, the case will be left open and may have to be tried again.

Obviously, another trial would only serve to increase the cost to both sides, and there is no reason to believe the case can be tried again by either side any better or more exhaustively than it has been tried before you.

Any future jury must be selected in the same manner and from the same source as you were chosen, and there is no reason to believe that the case could ever be submitted to twelve men and women more conscientious, more impartial, or more competent to decide it, or that more or clearer evidence could be produced.

If a substantial majority of your number are in favor of a conviction, those of you who disagree should reconsider whether your doubt is a reasonable one, since it appears to make no effective impression on the minds of others.

On the other hand, if a majority or even a lesser number of you are in favor of acquittal, the rest of you should ask yourselves again, and most thoughtfully, whether you should accept the weight and sufficiency of evidence which fails to convince your fellow jurors beyond a reasonable doubt.

> Remember at all times that no juror is expected to give up an honest belief he or she may have as to the weight or effect of the evidence; but after full deliberation and consideration of the evidence in the case, it is your duty to agree upon a verdict if you can do so.
>
> You must also remember that if the evidence in the case fails to establish guilt beyond a reasonable doubt, the defendant should have your unanimous verdict of not guilty.
>
> You may be as leisurely in your deliberations as the occasion may require, and should take all the time which you may feel is necessary.
>
> I will ask now that you retire once again and continue your deliberations with these additional comments in mind to be applied, of course, in conjunction with all of the other instructions previously given to you.

Gov't C.A. Br. App. Approximately one hour and 15 minutes after receiving this modified *Allen* charge, the jury returned its verdict. Pet. 12; Gov't C.A. Br. 17.

4. The court of appeals affirmed by an unpublished per curiam opinion. Pet. App. A2-A3. The court concluded that "[t]he record clearly reflects that [petitioner] received a fair trial and there was no error committed by the district court." *Id.* at A3.

ARGUMENT

1. Petitioner contends that the district court erred in denying petitioner's request for an entrapment instruction. Pet. 13-20.

"[A] valid entrapment defense has two related elements: government inducement of the crime, and a lack of predisposition on the part of the defendant to engage in the criminal conduct." *Mathews* v. *United States*, 485 U.S. 58, 63 (1988). "As a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." *Ibid.* In this case, petitioner failed to present evidence from which a jury could reasonably find either of the necessary elements of the entrapment defense: that the government induced petitioner to commit a crime or that petitioner was not predisposed to commit one. The district court thus properly denied his request for an entrapment instruction. See *United States* v. *Molinaro*, 877 F.2d 1341, 1349 (7th Cir. 1989) (defendant "must demonstrate that there was sufficient evidence for a reasonable jury to find that the government induced her to commit the crime and that she was not predisposed to engage in the criminal conduct").

a. Petitioner did not present evidence sufficient for a reasonable jury to find that the government induced him to commit a crime. "Inducement focuses on whether the government's conduct could have caused an undisposed person to commit a crime." *United States* v. *Kelly*, 748 F.2d 691, 697 (D.C. Cir. 1984). Thus, a government agent who merely seeks out the defendant, or proposes an illegal transaction, does not induce the defendant to commit a crime. See, *e.g.*, *United States* v. *Wright*, 921 F.2d 42, 45 (3d Cir. 1990), cert. denied, 111 S. Ct. 2803 (1991); *United States* v. *Humphrey*, 670 F.2d 153, 156 (11th Cir.),

cert. denied, 456 U.S. 1010 (1982); see also *Jacobson* v. *United States*, 112 S. Ct. 1535, 1541 (1992) ("Had the agents in this case simply offered petitioner the opportunity to order child pornography through the mails, * * * it is unlikely that his entrapment defense would have warranted a jury instruction."). And "[l]aw enforcement officials * * * may properly make use of undercover operations, in which they assume false names and false appearances." *Kelly*, 748 F.2d at 698 n.16; see also *Jacobson*, 112 S. Ct. at 1540 ("there can be no dispute that the Government may use undercover agents to enforce the law"); *Sorrells* v. *United States*, 287 U.S. 435, 453-454 (1932) (Roberts, J., concurring) ("Society is at war with the criminal classes, and courts have uniformly held that in waging this warfare the forces of prevention and detection may use traps, decoys, and deception to obtain evidence of the commission of crime.").

In this case, petitioner contacted Adams, the government's confidential informant, to inquire about the availability of cocaine for sale, and he took the lead in seeking to arrange the transaction. Compare *Sorrells*, 287 U.S. at 441 (crime "was instigated by the prohibition agent"). His action thereby establishes that the government's conduct did not "induce" him to commit the crime.

b. Petitioner also failed to present evidence sufficient to allow a reasonable jury to find that he was not predisposed to commit the offense. "The predisposition requirement is meant to eliminate the entrapment defense for those defendants who would have committed the crime anyway, even absent Government inducement." *Jacobson* v. *United States*, 112 S.

Ct. 1535, 1546 (1992) (O'Connor, J., dissenting). It is "a state of mind which readily responds to the opportunity furnished by the officer or his agent to commit the forbidden act for which the accused is charged." *United States* v. *Burkley*, 591 F.2d 903, 913-916 (D.C. Cir. 1978), cert. denied, 440 U.S. 966 (1979) (quotation marks omitted). Thus, "an agent deployed to stop the traffic in illegal drugs may offer the opportunity to buy or sell drugs, and, if the offer is accepted, make an arrest on the spot or later. In such a typical case, or in a more elaborate 'sting' operation involving government-sponsored fencing where the defendant is simply provided with the opportunity to commit a crime, the entrapment defense is of little use because the ready commission of the criminal act amply demonstrates the defendant's predisposition." *Jacobson*, 112 S. Ct. at 1541.

Therefore, to make the required showing that he was not predisposed, a defendant must establish that he was reluctant to commit the offense and that his reluctance was overcome only by government inducement or persuasion. See *Jacobson*, 112 S. Ct. at 1541 ("By the time petitioner finally placed his order, he had already been the target of 26 months of repeated mailings and communications from Government agents and fictitious organizations"); *Sorrells*, 287 U.S. at 441 ("agent lured defendant, otherwise innocent, to * * * commission [of the crime] by repeated and persistent solicitation in which he succeeded by taking advantage of the sentiment aroused by reminiscences of their experiences as companions in arms in the World War"); *United States* v. *Reynoso-Ulloa*, 548 F.2d 1329, 1336 (9th Cir

1977) ("most important factor" is "whether the defendant evidenced reluctance to engage in criminal activity which was overcome by repeated Government inducement"), cert. denied, 436 U.S 926 (1978).

At all times, petitioner showed that he was "ready and willing" to commit the crime. See *Kelly*, 748 F.2d at 699. He initially contacted Woods and said he was interested in purchasing cocaine both for out-of-town buyers and for himself. At his first meeting with the DEA agents, he claimed to represent out-of-town purchasers who were interested in buying multi-kilogram amounts of cocaine on a biweekly basis. Throughout the relevant time period, petitioner remained ready and willing to complete the proposed transaction. He did reduce the amount of cocaine involved in the deal from 11 kilograms to five and one-half kilograms, but he offered no evidence showing that either Woods or the agents played any role in establishing the cocaine amounts. Petitioner called Woods to arrange the deal after the buyers arrived, and he accompanied the buyers to the agreed-upon site of the exchange of cocaine for more than $88,000 in cash. The district court thus correctly denied petitioner's request for an entrapment instruction.

2. Petitioner also contends that the district court erred when it gave a modified *Allen* charge to the jury. Pet. 21-25. That contention is without merit.

This Court has held on numerous occasions that supplemental instructions like the one given here are not per se coercive. *Lowenfield* v. *Phelps*, 484 U.S. 231, 237-241 (1988); *Kawakita* v. *United States*, 343 U.S. 717, 744 (1952), aff'g 190 F.2d 506, 521-528 (9th Cir. 1951); *Lias* v. *United States*, 284 U.S. 584, aff'g 51

F.2d 215, 218 (4th Cir. 1931); *Allen* v. *United States*, 164 U.S. 492, 501-502 (1896); see also *Lowenfield* v. *Phelps*, 484 U.S. at 238 n.1 (collecting circuit cases reaching same conclusion).

Petitioner argues that the *Allen* charge—"in its context and under all the circumstances," *Jenkins* v. *United States*, 380 U.S. 445, 446 (1965)—coerced the jury into returning a guilty verdict on one of two counts against petitioner. The factors usually examined as part of this inquiry, however, show that use of the *Allen* charge in this case was not impermissibly coercive.

First, the judge neither inquired into nor learned of the numerical division of the jury. See *Brasfield* v. *United States*, 272 U.S. 448, 450 (1926) (if the trial judge inquires into the numerical division of the jury and then gives an *Allen* charge, the charge is considered per se coercive). If the trial judge does not have such knowledge, an *Allen* charge is evenhanded (assuming, as the law does, that a hung jury is of equal benefit and detriment to the prosecution and the defense): "[I]n an ordinary criminal trial, an *Allen* charge will not steer the jury one way or the other on the merits, because it is as likely that the minority jurors are for conviction as for acquittal." *Lowenfield* v. *Phelps*, 484 U.S. at 252 (Marshall, J., dissenting).

Second, the district court gave the *Allen* charge only once. See *United States* v. *Seawell*, 550 F.2d 1159, 1163 (9th Cir. 1977) ("If the charge is to pass muster as instruction on the law there is little need to repeat it save at the jury's request.").

Third, the district court told the jurors: "Remember at all times that no juror is expected to give up an honest belief he or she may have as to the weight or effect of the evidence." P.6, *supra*. A reminder such as that "supports the conclusion that the *Allen* charge was not impermissibly coercive." *United States* v. *Ajiboye*, 961 F.2d 892, 894 (9th Cir. 1992).

Fourth, the district judge did not *order* the jury to return a verdict; rather, the judge told the jury that "it is your duty to agree upon a verdict *if you can do so*." P.6, *supra*; see *Hyde & Schneider* v. *United States*, 225 U.S. 347, 382 (1912) (rejecting claim of coercion because judge told the jury that if "they could not conscientiously and freely agree upon a verdict they would be discharged").

Fifth, the district court did not fix a time limit for the jury's further deliberations. Instead, the court stated: "You may be as leisurely in your deliberations as the occasion may require, and should take all the time which you may feel is necessary." P.6 *supra*; cf. *United States ex rel. Anthony* v. *Sielaff*, 552 F.2d 588, 590 (7th Cir. 1977) (time limit on further deliberations can be coercive).

Sixth, the jury did not immediately return its verdict after the charge; instead, the jury continued to deliberate for approximately an hour and a quarter after receiving the instruction. This indicates that the jury was not impermissibly coerced. See, *e.g.*, *United States* v. *Nichols*, 820 F.2d 508, 512 (1st Cir. 1987) (one-hour period between charge and verdict not indicative of coercion); *United States* v. *Smith*, 635 F.2d 716, 721-722 (8th Cir. 1980) (45-minute period not

indicative of coercion); *United States* v. *Bailey*, 480 F.2d 518 (5th Cir. 1973) (en banc) (90-minute period not indicative of coercion); *Andrews* v. *United States*, 309 F.2d 127, 129 (5th Cir. 1962) (25-minute period not indicative of coercion), cert. denied, 372 U.S. 946 (1963).

Finally, the jury did not return guilty verdicts on all the counts before it; instead, the jury convicted petitioner on one count, but not on the other. See *United States* v. *Foster*, 711 F.2d 871, 884 (9th Cir. 1983) (the fact that the jury rendered discriminating verdicts "significantly weakens [the] argument that the jury was coerced by the *Allen* charge"), cert. denied, 465 U.S. 1103 (1984).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

THOMAS M. GANNON
Attorney

NOVEMBER 1992